

B R A M M E R, Presiding Judge.

¶1 Israel Otero appeals his convictions and sentences for first-degree murder and tampering with physical evidence. He argues the admission of a transcript of his wife’s testimony from another trial violated his confrontation rights. He also contends the trial court violated his right to a fair trial in allowing the state to introduce evidence he was in pre-trial custody and erred in denying his motion to sever his trial from that of codefendant John Romero. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Otero’s convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Patrick G. and Annie L. went to Otero’s home on June 2, 2008. When they arrived, Annie stayed in the car while Patrick spoke with Otero in the carport. Patrick told Annie he was going inside to look at Otero’s plasma television. She then heard “loud pounding sounds” that sounded like “fighting, hitting, pounding” coming from inside the home. She got out of the car and Romero ran towards her swinging a bat, hitting her twice. Annie did not see Patrick again.

¶3 Otero, Romero, and Jonathan Ramil approached Annie and told her to lie down on the ground. She heard Otero tell the others that they would “put him where they talked about before.” Annie could hear Patrick moaning and “gurgling.” She then saw a red or orange truck pull up to the home that she recognized as one Romero often drove. Otero told Annie to get in the passenger side of Patrick’s car. At that time, Annie believed Patrick was in the truck because he had not been put in Patrick’s car and they had said they were going to “load him.” Romero drove the truck and Ramil stayed

behind to “clean up the mess.” The two vehicles left and turned down a dirt road. Annie saw the lights on the truck in front of her go out. Otero drove Patrick’s car off the road and through a fence, and then stopped. Otero wiped the car down and walked back to the road with Annie where Romero picked them up in the truck. The truck ran out of gas and Ramil came and picked them up.

¶4 After Otero, Romero, Ramil, and Annie returned to Otero’s home, Otero divided money from Patrick’s wallet and directed someone to throw the wallet in a fire. Otero gave Ramil tools to cut the carpet and remove it from the house, telling him to burn the carpet once it had been removed. Later, red and blue lights from two police vehicles could be seen heading down the road toward where Patrick had been left and they were “panicking, running around,” and told Annie to leave. A deputy found Patrick under a tree; he was unresponsive and later pronounced dead.

¶5 Detectives later surveilled Otero’s home and observed two males, one of whom dragged a large piece of rolled up carpet to a trash pile. They then took Ramil and the other man into custody. The detectives later found a burning trash pile, extinguished the fire, and recovered carpet, burned clothing, and a baseball bat. Inside the home, detectives observed blood spatter and that a section of carpet was missing. They later found the truck and observed blood both inside and on the truck’s exterior. Deoxyribonucleic (DNA) testing confirmed some of the blood belonged to Patrick.

¶6 After the state charged Otero with first-degree murder and tampering with physical evidence, the trial court granted a motion to sever the trial of codefendant Ramil. Otero also filed a motion to sever his trial from that of Romero’s, which the court denied.

The state sought to call Otero's wife as a witness and Otero invoked the marital communication privilege under A.R.S. § 13-4062(1). Although the court determined Otero's wife had waived that privilege by testifying in prior proceedings against Ramil,¹ it nonetheless determined the anti-marital fact privilege applied and she could not be compelled to testify. The state then sought to admit a transcript of her testimony from Ramil's trial. The court permitted her prior testimony to be read into evidence.

¶7 At Ramil's trial, Otero's wife had testified she had not slept at the home she shared with Otero on the night of June 2, 2008, because he and Ramil were "going to do yard work and change out carpet," but instead had stayed at her niece's house. She had returned briefly to her home later that night to pick up a light to "do [her] niece's nails." When she returned home, Otero and Ramil already were there, and Romero arrived later in an orange or red truck. She saw Otero and Ramil again at approximately 2:00 a.m. when they came to her niece's house. She left with Otero to go to Benson to stay in a motel. While in Benson, she had overheard Otero call Ramil to tell him to finish pulling up the carpet. She went back to her home later that day but was not allowed inside. Otero did not return with her and told her he "couldn't go home because of the cops." Once allowed inside her home, she found the carpet was missing and blood was "all over" the living room. She also testified she and Otero previously had planned on changing the carpet, and in fact already had purchased replacement carpet that was stored

¹We note this determination was incorrect because, subject to certain exceptions, only Otero, as the holder of the privilege, could waive that privilege. *See* § 13-4062(1) (neither spouse can "be examined as to any communication made by one to the other during the marriage" without the consent of the other).

behind the house. Other facts relevant to issues in this appeal will be discussed in the analysis of those issues.

Discussion

Right of Confrontation

¶8 Otero contends the admission of the transcript of his wife’s prior testimony violated his confrontation rights under the Sixth Amendment of the United States Constitution and article II, § 24 of the Arizona Constitution. Otero also argues the evidence was admitted erroneously under Rule 19.3, Ariz. R. Crim. P. The trial court admitted the testimony under Rules 804(a)(1) and 804(b)(1), Ariz. R. Evid., rejecting Otero’s confrontation clause argument, having concluded Otero’s wife had been rendered unavailable because Otero had claimed the spousal privilege. The court also noted her prior testimony was both under oath and subject to cross-examination in the prior matter, stating Ramil’s “interests and motivation in cross-examining her” were the same there as Otero’s would be in his case. We review challenges to the admissibility of evidence under the Confrontation Clause de novo. *State v. King*, 213 Ariz. 632, ¶ 15, 146 P.3d 1274, 1278 (App. 2006).

¶9 The Sixth Amendment to the United States Constitution guarantees the accused the right “to be confronted with the witnesses against him.” Similarly, article II, § 24 of the Arizona Constitution provides the accused with the right “to meet the witnesses against him face to face.” *Crawford v. Washington* bars the admission of testimonial statements made by a witness not appearing at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S.

36, 68 (2004). Otero had no opportunity to cross-examine his wife in Ramil’s trial as required under *Crawford*, and thus the admission of her prior testimony against him violated his confrontation clause rights. *See id.* (“Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.”).

¶10 But, whether the admission of prior testimony violates the confrontation clause is a different inquiry than whether it violates the hearsay rules. *See State v. Bass*, 198 Ariz. 571, ¶ 35, 12 P.3d 796, 805 (2000). Rule 804(b)(1), Ariz. R. Evid., permits the admission of former testimony “in criminal actions or proceedings as provided in Rule 19.3(c), [Ariz. R. Crim. P.]” when the declarant is unavailable. A witness can be considered unavailable if “exempted by ruling of the court on the ground of privilege from testifying.” Ariz. R. Evid. 804(a)(1). Rule 19.3(c), Ariz. R. Crim. P., further provides as follows:

Statements made under oath by a party or witness during a previous judicial proceeding . . . shall be admissible in evidence if . . . [t]he party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has . . . and . . . [t]he declarant is unavailable as a witness, or is present and subject to cross-examination.

¶11 Otero was not a party in Ramil’s trial in which his wife gave the testimony admitted in this case and he had no opportunity to cross-examine her in that proceeding. And, the rule’s statement that the party cross-examining the witness in the former proceeding must have the same “interest and motive” in cross-examining the witness as

in the present proceeding is based on the requirement that the party be identical in both proceedings. Under Rule 19.3(c), Ariz. R. Crim. P., the former testimony clearly is inadmissible. The state concedes, and we agree, the trial court admitted the former testimony of Otero's wife in violation of both the confrontation clause and Rule 19.3.²

¶12 Although we conclude the trial court erroneously admitted this testimony, we nonetheless must determine whether the error was prejudicial or harmless. *See Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d at 805 (reviewing admission in violation of confrontation clause for harmless error); *see also State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008) (confrontation clause errors subject to harmless error analysis). “Error is harmless if we can conclude, beyond a reasonable doubt, that the error did not contribute to or affect the jury’s verdict.” *State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004). “‘The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.’” *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993), *quoting Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). “Evidence is cumulative, and therefore error is cured only where the tainted evidence supports a fact otherwise established by existing evidence.” *Bass*, 198 Ariz. 571, ¶ 40, 12 P.3d at 806.

²Alternatively, the state argues Otero waived his rights under the confrontation clause by invoking the marital privilege. Because we find any error harmless, we need not address this argument.

¶13 The state argues the error was harmless because the information provided by Otero's wife's prior testimony was cumulative and "of little importance given the strength of the [s]tate's case." Otero does not allege that any part of his wife's prior testimony was incriminating and the record reflects her testimony in no way discussed Patrick or Annie and did not place them in Otero's home. Although Otero's wife testified about the blood in the living room, she offered no testimony as to whose blood it was or how it got there. Other testimony and evidence presented at trial implicated Otero in the murder, including detailed testimony from Annie and DNA testing linking the blood stains to Patrick. Additionally, the state offered the testimony of P.M., who was housed in jail with Otero, and who read into the record a copy of a "rap song" Otero had shared with him in jail, confessing to the murder.

¶14 Any arguably incriminating testimony was cumulative. Otero's wife testified there was blood "all over" the living room and the carpet was missing. However, detectives also testified there was blood spatter in the home and missing carpet, and the jury had before it a photograph of the inside of the home showing those things. In her prior testimony, Otero's wife also discussed how she and Otero went to Benson and that Otero had told her he could not go home because of the police. Another witness testified he drove Otero and his wife to Benson and rented them a motel room. Additionally, a detective testified Otero was not arrested until six days after detectives had searched his home, at which time he told one of the officers he was wanted for murder. Because it was merely cumulative, and in view of the other testimony and evidence presented at trial, we are satisfied beyond a reasonable doubt that the admission

of Otero's wife's prior testimony did not impact the verdict. *See Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d at 805. Thus, the erroneous admission of the prior testimony was harmless.

Evidence of Pre-Trial Custody

¶15 Otero argues the trial court erred in allowing the state to introduce, over his prejudice and relevancy objections, evidence that he was in custody at the time of trial. The state introduced testimony that while in jail, Otero had removed mortar around some of the bricks in his cell. Although the court allowed the testimony because it was relevant to the state's request for a "flight" jury instruction, it acknowledged the evidence "brought out things that normally are not brought out, namely the defendant's custody status." Otero argues he was denied his constitutional right to a fair trial under the Sixth Amendment because the testimony could "instill a belief that [he] was a dangerous individual who could not be controlled." "We will not disturb a trial court's determination on the admissibility and relevance of evidence absent an abuse of discretion." *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002).

¶16 Proof of flight is relevant evidence that can indicate consciousness of guilt. *State v. White*, 101 Ariz. 164, 165, 416 P.2d 597, 598 (1966). Relevant evidence, however, may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. The trial court has broad discretion in admitting or rejecting this evidence because it is in the best position to balance the probative value of challenged evidence against the potential for unfair prejudice. *State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007). All evidence to some degree is prejudicial but is unfairly prejudicial only if it "has an undue tendency to

suggest decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Generally, evidence is viewed in the light most favorable to the proponent, maximizing probative value and minimizing prejudice. *State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (App. 1991).

¶17 Otero relies on cases noting the constitutional right to a fair trial includes the right to appear in court free of shackles. *See Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989) (“Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles.”); *Fountain v. United States*, 211 F.3d 429, 436 (7th Cir. 2000) (shackling defendant may have prejudicial impact); *State v. Boag*, 104 Ariz. 362, 365, 453 P.2d 508, 511 (1969) (same). Nonetheless, these cases observe that the decision whether to shackle a defendant at trial is subject to the trial court’s discretion. *See Spain*, 883 F.2d at 716; *Fountain*, 211 F.3d at 436; *Boag*, 104 Ariz. at 365, 453 P.2d at 511.

¶18 The testimony about which Otero complains was both relevant and necessary for the state to obtain a “flight” instruction, and evidence he was in pre-trial custody was incidental to that admissible testimony. His comparison of his in-custody status to appearing shackled in court is unpersuasive. We agree with the state that “[e]vidence of pre-trial incarceration could hardly instill a belief of dangerousness to the same degree that the visible display of shackles could.” Viewing the testimony in the light most favorable to the state, we cannot say its probative value was outweighed substantially by the danger of unfair prejudice. *See Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d at 607. Therefore, the trial court did not abuse its discretion in admitting it.

Motion to Sever

¶19 Otero also argues the trial court erred in denying his motion to sever his trial from that of codefendant Romero. The court had admitted into evidence a recording of detectives' interview of Romero, and Otero argues he was prejudiced by its admission. A motion to sever, if denied, is waived unless it is "renewed during trial at or before the close of evidence." Ariz. R. Crim. P. 13.4(c). Because Otero did not renew at trial his pre-trial motion to sever, we review solely for fundamental error. *See State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996).

¶20 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Such error must be "clear, egregious, and curable only via a new trial." *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). To obtain relief on appeal under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The prejudicial nature of the error is a fact-intensive inquiry and thereby case specific. *Bible*, 175 Ariz. at 572, 858 P.2d at 1175; *see also Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608.

¶21 Pursuant to Rule 13.4(a), Ariz. R. Crim. P., a trial court must grant a motion to sever the joint trials of two or more defendants when "necessary to promote a

fair determination of the guilt or innocence of any defendant of any offense.” A defendant challenging the denial of a motion to sever must show prejudice, which can occur when evidence admitted against one defendant is “facially incriminating to the other defendant,” or “has a harmful rub-off effect on the other defendant.” *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). Otero points to several statements Romero made in his interview, but fails to indicate which of them were prejudicial. Romero told detectives he had gone to Otero’s home to buy a bag of “weed” and Otero had told him Patrick was on his way over. Romero also had denied hitting Annie with a bat.

¶22 To the extent Romero’s statements are incriminating because they place Patrick at Otero’s home, they merely are cumulative. Testimony from Annie and DNA evidence placed Patrick at the home. Romero’s statement about buying “weed” also was cumulative of other testimony presented at trial indicating Otero used drugs. Moreover, the trial court protected against any potential for prejudice by instructing the jury to consider separately both the charges against Otero and Romero and the evidence presented against each of them. We presume the jury follows its instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Otero has failed to demonstrate the court’s denial of his motion to sever was error or that it caused him actual prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Accordingly, he has failed to establish fundamental, prejudicial error.

Disposition

¶23 For the reasons stated, we affirm Otero's convictions and sentences for first-degree murder and tampering with physical evidence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge